**IN THE HIGH COURT OF UTTARANCHAL AT ANINITAL**

Chapter VIII, Rule 32(2) (b)
Description of case

**Writ Petition No. 241 of 2002 (S/B)**

**&**

**Writ Petition No. 511 of 2003 (S/B)**

Date of decision: 27th September, 2004

For the approval of:

Hon'ble Chief Justice V.S. Sirpurkar.

Hon'ble Mr. Justice Irshad Hussain.

- Whether the order/judgment should be sent to the reporters for reporting? ( yes )

- Whether the reporters be allowed to see the judgment? ( yes )

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**IN THE HIGH COURT OF UTTARANHCHAL AT NAINITAL**

**Writ Petition No. 241 of 2002 (S/B)**

Dr. Kavita Pandey,
W/o Late Dr. Atul Kumar Pandey,
Professor & Head, Department of Physics,
D.S.B. Campus, Nainital, Kumaon University,
Nainital. ..... Petitioner

Versus

Chancellor, Kumaon University,
Nainital & others. ..... Respondents

Mr. Manoj Tiwari, learned counsel on behalf of the petitioner.
Mr. Sudhanshu Dhulia, learned Senior Advocate assisted by Ms. Puja Banga, Advocate on behalf of respondent No. 4.
Mr. B.D. Upadhyaya, learned counsel on behalf of respondent No. 2.

**&**

**Writ Petition No. 511 of 2003 (S/B)**

Dr. Chandra Shekhar Mathela,
S/o Sri G.D. Mathela,
Professor & Head of Department of Chemistry,
D.S.B. Campus, Nainital & another. ..... Petitioners

Versus

State of Uttaranchal,
Through its Secretary,
Higher Education, Govt. of Uttaranchal,
Dehradun & others. ..... Respondents

Mr. L.P. Naithani, learned Senior Advocate assisted by Mr. Prabhakar Joshi, Advocate on behalf of the petitioners.
Mr. B.D. Upadhyaya, learned counsel on behalf of respondent No. 2 & 3.

**Coram: Hon'ble V.S. Sirpurkar, C.J.,**
**Hon'ble Irshad Hussain, J.**

Dated 27th September, 2004

**(Per Hon'ble the Chief Justice)**

1. This judgment shall dispose of the writ petition No. 241 of 2002 (S/B) filed by Dr. Kavita Pandey as also the writ petition No. 511 of 2003 (S/B) filed by Dr. Chandra Shekhar Mathela & Dr. G.C. Joshi. The writ petition filed by Dr. Mathela & another is almost

counterblast to the earlier writ petition filed by Dr. Kavita Pandey. The controversy involved in both the writ petitions is common and it is, therefore, that the two writ petitions are being disposed of by this common judgment.

2. We shall first take-up the first referred writ petition. The petition is initially filed was for the following prayers:

i. Issue a writ, order or direction in the nature of certiorari quashing the Notification dated 28.2.2002 issued by the respondent No. 2 annexed as Annexure 10 to the writ petition.

ii. Issue a writ, order or direction in the nature of certiorari quashing the resolution No. 11 of the Executive Council dated 20.1.1998 annexed as Annexure 9 to the writ petition.

iii. Issue a writ, order or direction in the nature of mandamus commanding the respondents to consider and fix the seniority on the basis of the resignations submitted and accepted in 1984.

**basic Pleadings of the Parties:**

3. The writ petition was extensively amended later on. Initially, the writ petition was based on the following facts:

i. That the petitioner started her career as a Lecturer in Physics on 3rd September, 1968 and appointed as a temporary lecturer in Raza Government P.G. College, Rampur. Later on, while serving as an ad-hoc lecturer, she was appointed through Uttar Pradesh Public Service commission as a Lecturer vide Notification dated 9.12.1970. She was then transferred to Devi Singh Bisht College (from hereinafter referred to as the "DSB College" for short), Nainital. She claims to have been regularised on 11th June, 1975 w.e.f. 3rd June, 1973. She then points out that the Kumaon University was constituted by

Notification under Section 4 of the U.P. State University Act, 1973 w.e.f 01.11.1973 and after the constitution of the University, the said DSB College was attached to the University. The teachers, who were from the Government Degree College and the Government Post Graduate Colleges, were given an option to join the University and for that purpose, a screening committee was formed. The teachers, who were selected, alone, were given this option to be absorbed in the University. It is claimed that those teachers, who were selected after screening and had resigned from the Government service, were absorbed in the University service after screening and the others like the petitioner were treated as an external deputation in the service of University from their Government service. The petitioner then makes a reference to the Notification dated 29.09.1977 being Notification No. 5712/15(1) by which the teachers working in the Institution were required to give an undertaking that they would abide by the service conditions imposed by the State Government at the later stage. A reference is then made to the further condition that the teachers, who were working on the permanent basis and who were selected by the screening committee would have to opt either for the Government service or as a teacher of the Kumaon University.

ii. A reference is then made to the Notification dated 16.2.1979, whereby it was notified that the teachers, who had already been working as Government teachers, would have to give their option for the purpose of being absorbed in the service of the University. It is, then, pointed out that as many as 21 teachers submitted their resignation from the Government service, which resignations were accepted by the respondent No. 3 State of Uttaranchal by Notification dated 21.09.1984. This is only to suggest that the respondent No. 4, who was the similar Government teacher and who was selected by the screening committee formulated by the University for selecting the teachers in the University, had not given such a resignation. The petitioner also asserted that this was a final chance for such teachers like respondent No. 4. The petitioner, then, asserts that therefore the

respondent No. 4 remained a Government teacher leaving his lien as a Government teacher alike. At the same time, the petitioner asserts that the petitioner was similarly working as a Government teacher "was not screened by the screening committee since she was a regular appointee of the Public Service Commission. She resigned from the cadre of Government teacher w.e.f. the afternoon of 30.08.1979." In short, the assertion on the part of the petitioner is that while she snapped her relationship with the Government and became a full fledged University teacher w.e.f. 30.08.1979, the respondent No. 4 continued to be the Government servant as he had not resigned from the Government service and therefore, had not become the University teacher and as such, the petitioner should be deemed to be senior to respondent No. 4, at least, in so far as the University service is concerned.

iii. In order to buttress this plea of seniority the petitioner, then, asserted that the Government had issued a Notification dated 12.12.1983 for granting selection grade to the lecturers with a condition that those lecturers, who had put in 13 years of continuous service as lecturer satisfactorily and had worked for 5 years in the same University, would be entitled to get the selection grade. However, there was an embargo that the benefit would be extended to the teachers in accordance with their respective seniority and that the junior lecturers would not get the selection grade till the teachers senior to them complete the conditional period of service. A reference is also then made to Notification dated 25.02.1984, whereby the personal promotion scheme was floated providing that the scheme could be availed by a lecturer only if he had worked for a minimum period of 5 years on the permanent post in the University. These facts have been suggested for buttressing the contention that the respondent No. 4 was not entitled to get the benefits of either the selection grade or the personal promotion scheme as he had not opted in favour of the University by offering resignation from the post of the Government teacher because by continuing in the Government service (by not

resigning from the same), he could not be said to have completed 5 years of continuous service in the University. A reference is then made to the Executive Council Meeting held on 13.05.1985 and to Resolution No. 36, whereby the resignation of respondent No. 4 is accepted with retrospective effect from 13.12.1983. A reference is also then made to the fact that the recommendation for the acceptance of the resignation of respondent No. 4 was also accepted by the Director, Higher Education vide Resolution No. 16 of the Executive Council Meeting dated 20.01.1986. An assertion is thereafter made that the respondent No. 4 could have joined as a lecturer only after 20.01.1986 and that he could not have been included in the personal promotion scheme at all. A reference is thereafter made to the Notification dated 07.09.1987 issued by the State of Uttar Pradesh providing for certain benefits to be extended to the teachers working in the University, who had resigned in pursuance of the Notification dated 16.02.1979. It is then suggested that clause (3) of this Notification dated 07.09.1979 provided that all the teachers, who had resigned in pursuance of the Notification of 1979 earlier and had been absorbed in the services of the University, could opt for GPF under Clause (3) of the Notification. It is then asserted that since the respondent No. 4 had not resigned in pursuance of the Notification dated 16.02.1979, he could not be covered by Clause (3) of the 1987 Notification and as such, was not entitled for any benefits thereunder. The petitioner then assails this Notification dated 07.09.1987 on the ground that it is silent regarding the acceptance of the resignation given by the teachers. It is also suggested that it is also silent about the teachers, who had not resigned in pursuance of the 1979 Notification. A reference is then made to the 42$^{nd}$ Meeting of the Executive Council dated 20.01.1988 and the Resolution No. 11 by which the University accepted the resignation of the teachers with retrospective effect. It is suggested that his resignation has been shown to be dated 15.08.1977 and that if the respondent No. 4 had already resigned in 1985 and that resignation was accepted by the Executive Council w.e.f. 30.12.1983, he could not be given a second

chance to resign so as to bring his resignation w.e.f. 15.08.1987, which would grant him the seniority over and above the petitioner in so far as the University service is concerned. This Resolution No. 11 is, therefore, heavily assailed by the petitioner. It is then pointed out that the Resolution was subject to the approval by the Director of Higher Education and when the petition was filed, there was no approval till the date of filing of the writ petition. It was, therefore, suggested that the Resolution was nothing, but a colourable exercise of powers. A reference is then made to the Notification dated 28.02.2002, which suggests that the State Government had proceeded to grant approval to the amended option letters accepted by the Executive Council vide its Resolution No. 11 dated 20.01.1988. It is, therefore, expressed that if the Notification dated 28.02.2002 is brought into effect, it will result into entire chaos because by accepting the new date of resignation of the teachers like respondent No. 4, they would be rendered senior to the teachers, who had already resigned earlier and had completed the requisite span of service of the University for the purpose of personal promotion scheme. The Notification dated 28.02.2002 is, therefore, assailed on this count also. A further reference is made to a seniority list published on 22.11.2001, wherein the respondent No. 4 is shown at serial No. 7 and it is suggested that the respondent could not be shown in the said seniority list. It is pointed out that if the Notification dated 28.02.2002 is enforced and thereby the Resolution No. 11 dated 20.01.1988 by the Executive Council is confirmed, the respondent No. 4 would become senior to the petitioner merely because he was able to get his second resignation acted upon retrospectively w.e.f. 1977. It is on these grounds that initially the writ petition came to be filed.

4. The writ petition was initially ordered upon and the notice was sent to the respondents. An order ultimately came to be passed on 04.06.2002 that the Vice Chancellor of the Kumaon University had set up a Committee for finalization of the seniority list and that the list could be finalized and the matter was to be reported to the Court. In

the meantime, however, and particularly after the counters were filed by the University as well as the respondent No. 4, a supplementary affidavit came to be filed by the writ petitioner.

5. In the counter affidavits filed to the initial writ petition, the contesting respondent i.e. the University and the respondent No. 4 opposed the writ petition and pointed out that even the respondent No. 4 was appointed on temporary post by order dated 09.12.1970 and vide order dated 11.6.1975 both of them were regularized. It was pointed out that in the regularization order, as also in the initial appointment order, the respondent No. 4 was shown above the petitioner and therefore, he was deemed to be senior to the petitioner in Government service. In its counter affidavit, the University further pointed out that after the DSB College, where the petitioner and the respondent were working, was transferred to the University as its constituent college, the University became a teaching University and before that it was only an examining body. A reference is then made to the passing of the U.P. State Universities Removal of Difficulties (Twelfth) Order, 1976 dated 20.09.1976. This order was felt necessary as there was dearth of regular teachers and the said teachers could be appointed only under Section 31 of the U.P. State Universities Act, for the selection of whom, there was no infrastructure available and therefore, it was provided that the posts of teachers of the aforesaid constituent colleges shall be filled up by selection through a screening committee. It was pointed out that clause (9) of the said Removal of Difficulties Order provided that the teachers appointed by the screening committee would be deemed to be the teachers of the University as if they were appointed under Section 31 of the U.P. State Universities Act, 1973 and would be on one year's probation from the date of their appointment. A reference is also made to clause (10) of the said Removal of Difficulties Order, wherein, it was suggested that the inter se seniority of the teachers, so selected, would be the same as it stood at the time when they were in the Government service before such selection. It was then pointed out

that the petitioner and the respondent, both, had appeared before the screening committee, however, the petitioner was not selected while the respondent No. 4 was actually selected and appointed. It was also asserted that the respondent No. 4, on the date of issuing the appointment order, was actually working as a lecturer in DSB College. It was on this basis that it was pointed out by the University that the petitioner was not selected and was later on selected in the year 1979 under the modality provided by Section 31 of the U.P. State Universities Act, 1973 and therefore, it could never be said that the respondent No. 4 was a junior to the petitioner in any way. In fact, the position was just the reverse. It was pointed out that the respondent No. 4 had accepted the offer of appointment dated 16.8.1977 and had also given an option on 11.3.1985. It is also pointed out in paragraph 14 of the counter affidavit filed by the University that the petitioner, after her initial rejection by the screening committee, was later on selected by the Public Service Commission under the modality provided by Section 31 of the U.P. State Universities Act and yet, she did not join and made a request through her letter dated 07.04.1981 that she should be allowed on deputation as per the terms and conditions of the Government Order dated 16.2.1979 as done in case of other teachers, who had come through the screening committee (like the respondent No. 4). This request was made on 7.4.1981 and 29.9.1981. In short, it was asserted by the University that the respondent No. 4 was always senior to the petitioner and was rightly conferred the benefits of the Government Orders.

6. A reference is made to the Government Orders by which the teachers, who were working on deputation to the University, were also brought under the scheme of the personal promotion at the request of the Vice Chancellor. It was also asserted that the Resolution dated 20.01.1986 as also the letter dated 29.8.1985 were not correctly reproduced by the petitioner and the said correct Government Resolution was placed on record by the University along with the copy of the letter dated 29.8.1985 by the Vice Chancellor to the

Government requesting for extending the benefit of the personal promotion scheme to the persons like respondent No. 4. The University has also explained in its counter affidavit that the teachers, who were technically on deputation to the University, could not be given the benefit of the scheme and therefore, this aspect was brought to the notice of the Government and to overcome this difficulty, a further Notification dated 07.09.1987 was brought permitting the teachers of the University to resign from the Government service from the dated mentioned in the Notification so that they could get the benefit of personal promotion scheme on the basis of their 5 years continuous service in the University and it was, on this basis, that the number of teachers tendered their resignations. Even the petitioner has submitted an option on 5.12.1987 seeking her resignation from Government service w.e.f. 16.2.1980 and it is under these circumstances that the respondent No. 4 had also tendered his resignation w.e.f. 15.8.1977, which resignations were accepted by the University on 21.12.1987 in anticipation of the approval to be accorded by the Director of Higher Education, the Government and the Executive Council of the University. It is then pointed out that the Executive Council accepted the resignations in the meeting held on 22.01.1988 and ultimately, the Government also approved this. The University has also placed on record a copy of the option submitted by the petitioner, herself, dated 5.12.1987.

7. The counter affidavit of the University, further, makes a reference to the writ petition No. 41665 of 2000 filed by Dr. M.P. Joshi & others praying for the seniority on the basis of the date of eligibility and it was dismissed. It further makes a reference that after the State of Uttaranchal came into existence, on 5.1.2001, it passed an amendment in the statute 11.12 B of the University, by which the benefit of personal promotion was granted to the teachers of the University w.e.f. the date of their eligibility and the provisional seniority list of the teachers of the University was issued and the objections were invited and the Committee, in accordance with the

order passed by the Chancellor dated 18.5.2001, was also constituted to go into the question of seniority. It further points out that the proceeding of the said committee was produced before the Executive Council on 31.8.2001, which earlier took the view that the seniority of the teachers, who were screened by the screening committee and were taken on deputation would be decided on the basis of their resignations in accordance with the Notification dated 07.09.1987. It also decided that teachers, who have taken the benefit of the pension etc. before absorption in the University, would have to refund to the Government. This Resolution was passed on 30.08.2001, which was sent by the Vice chancellor on 27.11.2001 to the Government pointing out that the seniority of such teachers was in dispute and therefore, the decision taken by the Executive Council in its meeting dated 22.01.1988 was required to be approved by the Government so that their seniority would be decided in accordance with the decision of the Executive Council. It is then pointed out that it is under these circumstances that the Government granted its approval to the proceedings and the Resolutions of the Executive Council on proceedings and the Resolutions of the Executive Council on 28.2.2002. The University, therefore, opposes the writ petition. This counter affidavit was dated 29th April, 2002. Respondent No. 4 has also filed a separate counter affidavit dated 24th April, 2002 in tune with the stand taken by the University.

8. Initially, the court had prohibited the University from making effective any promotion without its prior permission. However, as per the orders of the Court dated 4.6.2002, exercise of finalisation of the seniority list was permitted and the list was published on 14.06.2002 and a supplementary affidavit was filed by the University on 1.07.2002. The petitioner also filed a supplementary affidavit on 12.07.2002. There are number of unnecessary allegation made in this supplementary affidavit, which are not relevant from the purpose of the controversy involved herein. The basic purpose of this supplementary affidavit seems to be for challenging the seniority list, in which the petitioner was shown junior to the respondent No. 4 in

contrast with the earlier list dated 15.2.2001, where the petitioner was shown to be at serial No. 4 and the respondent No. 4 at serial No. 11. This was obviously because till then the recommendation of the Executive Council of the University and the Vice Chancellor, regarding treating the teachers like the respondent No. 4 as the University teachers from the date they started their service after the screening, was not accepted or approved by the State Government, which was ultimately done on 28.02.2002.

9. Not satisfied with the first supplementary affidavit, a further supplementary affidavit came to be filed by the petitioner changing the whole tenor of her earlier writ petition and introducing fresh plea in support of her contention that she was senior. This second supplementary affidavit came to be filed only on 10th August, 2004, which is almost in the nature of a new petition. In this new supplementary affidavit, the petitioner, for the first time, accepted that the respondent No. 4 was selected by the screening committee though she avoided to state that she was rejected in comparison to the respondent No. 4 by the said screening committee for Kumaon University. The petitioner also asserted that she was selected by the screening committee constituted by the Garhwal University. The reference and the date of this selection are, however, not stated. There is a reference made in this affidavit to the further developments, to which, we have already referred earlier.

10. It is on the basis of these pleadings that the matters were argued before us.

11. It will be better at this stage to take stock of the other writ petition No. 511 of 2003 (S/B) filed by Dr. C.S. Mathela & another. Both the writ petitioners were working as lecturers in Government Degree College, Uttarkashi and P.G. College, Almora respectively. Both of them were absorbed in the Government service after their selection by the Public Service Commission in a permanent

vacancy. Both of them were confirmed also. Both the Colleges, where these two petitioners were working, were transferred to Kumaon University and both of them were also selected by the screening committee in the month of August, 1977 and they claimed that as per clause (9) of the Removal of Difficulties (Twelfth) Order dated 20.09.1976, they were deemed to be the teachers of the University as if appointed under Section 31 of the U.P. State Universities Act. It is pointed out by them that the moment, they had been selected and had accepted the order of appointment as teachers in the University, that point of time should be the starting point of their seniority. They, further, pointed out that they were promoted as Readers in December, 1984 and May, 1985 respectively and were also made Professors in December, 1995 and this was, obviously, on the assumption that their appointment as the University teachers was on 16.08.1977 and therefore, their seniority would also be reckoned with reference to that date. They further pointed out that their deputation was extended till 15.08.1982. They pointed out that no teacher had opted for being treated on deputation nor had anybody applied for the extension and it was only a move on the part of the Government to facilitate the transition. After they and the other 20 teachers were asked to resign from the Government service, in order to safe guard their position, they wrote a letter to the Registrar of the University on 23.07.1983 and accepted the option w.e.f. 12.08.1983. This was, obviously, for taking the benefit of pension scheme, which was to commence from 1.01.1984. They further pointed out that their resignations were accepted w.e.f. 12.08.1983. They also pointed out that their GPF account was closed and the Accountant General, U.P. had refunded the deposits. They further pointed out that when the personal promotion scheme was introduced by the State in the U.P. Universities by amending the Statute and introducing clause 11.12.B on 28.3.1985, the question came whether they had put in 5 years service in the University besides 13 years of service with Ph.D. or 16 years service without Ph.D. However, since the date of resignation was only 1983, they could not be said to have completed 5 years of

service. They pointed out the Government Order dated 07.09.1987 by the State of U.P. providing that if the teachers, who joined through the selection by the screening committee, give an option within 90 days, they would be treated as teachers from the date of joining the University. They then pointed out that the seniority list prepared at the instance of the earlier vice chancellor was changed at the instance of the officiating Voce Chancellor, in which, the petitioner No. 1 was shown to be a Reader w.e.f. 1988 and the petitioner No. 2 was also treated to be a Reader w.e.f. 1988 on the basis of the view taken that their seniority would be reckoned only from 1983, when they had resigned from the Government service. The petitioner pointed out this from Annexure 19 to their writ petition. They, then, pointed out that they were promoted under the personal promotion scheme and were also made Professors on the basis of their promotions granted as Reader in 1984 and 1985 respectively. They further pointed out that the Executive Council had stayed the seniority list on 21.03.2003 and that they had made the representation to the Chancellor under Section 68 for their being treated as seniors and for seniority being reckoned w.e.f. the date of their initially joining the University, on the basis of which, they were made Readers and ultimately, the Professors. They pointed out that no action had been taken till the time the petition was filed. They, therefore, prayed for quashing the order of the Chancellor dated 11.07.2003 and for refixing the seniority in the light of their contentions.

12. It is obvious that this second writ petition is nothing, but a counter blast to the writ petition filed by Dr. Kavita Pandey and owing to the last Resolution on the part of the Executive Council, which was approved by the Government and later on acted upon by the University fixing the fresh seniority and accepting the date of initial joining (immediately after the selection by the screening committee) as the basis of fixing their seniority, this writ petition has become infructuous in reality.

**Basic Questions falling for consideration:**

13. Inspite of the lengthy pleadings, full of unnecessary and irrelevant details, what becomes apparent is that a basic dispute, regarding the inter se seniority between the petitioner and the respondent No. 4, has been blown out of proportion. After considering all the basis facts and the subsequent developments, the position boiled down to the following basic questions:

i. As to whether the seniority should depend upon and reckoned w.e.f. the date when the teachers were selelcted by the screening committee and jointed the University?

ii. As to whether the said seniority should be reckoned from the date when they formally resigned from the Government service and formally joined the University?

iii. Thridly and lastly, as to whether the University and the Government were justified in allowing the teachers to resign retrospectively?

14. It is needless to mention that the first and the second question are inextricably intermingled and if the answer goes against the petitioner and in favour of respondent No. 4, in reality, the third question becomes superfluous because, then, the actions taken by the Government and the University would only be reduced to a formality. It will be our task, therefore, to discuss these three questions.

15. However, before that, one position must be clarified that even if the University has placed on record a new seniority list, there is still a remedy available by way of an appeal before the Chancellor via Section 68 of the U.P. Universities Act, which question was reiterated by the University and the respondent No. 4 in their counter affidavits. However, the learned counsel for the petitioner reiterated that it will be better to get a Court verdict on the basic principles to decide the inter se seniority amongst the University teachers in view of the importance of this question even for the other teachers, who are not parties to the writ petition. Learned counsel for the petitioner,

therefore, sought an authoritative verdict on the issue and hence, we are proceeding to decide the questions referred above.

16. Before we go on to the facts of the matter and appreciation thereof, it will be better to consider the provisions of the U.P. Universities Act. It is now an undisputed position that in so far as the Kumaon University is concerned, the two colleges, namely, DSB College, Nainital and the Government College, Almora were made over to the Kumaon University and before that, the teachers therein like the petitioner and the respondent No. 4 were regularized as Government servants as those Colleges had the status of Government College. All this happened in the year 1973. In that the University has pleaded and which has really not been controverted that when the petitioner and the respondent No. 4 were regularised vide order dated 11.06.1975, the respondent No. 4 was shown above the petitioner and was, therefore, deemed to be the senior. The petitioner had not controverted this factual position nor had bothered to challenge the same right from 1975 till she filed the present writ petition. We will have to look at the facts on the backdrop of this basic fact.

17. After the University came into existence, to began with, it was only an examining body and when it was to be transformed as a teaching University, the necessity was felt for passing the U.P. State University Removal of Difficulties (Twelfth) Order, 1976 dated 20.09.1976. This difficulty was felt on account of the provisions of Section 2(19) and Section 31 of the U.P. State Universities Act, 1973. Section 2(19) runs as under:

> "2(19) 'teacher of the University' means a teacher employed by the University for imparting instruction and guiding or conducting research either in the University or in an Institute or in constituent college maintained by the University."

Relevant portion of Section 31 runs as under:

"**31. Appointment of Teachers**. –

1. Subject to the provisions of this Act, the teachers of the University and the teachers of an affiliated or associated college (other than a college maintained exclusively by the State Government) shall be appointed by the Executive Council or the Management of the affiliated or associated college, as the case may be, on the recommendation of a Selection Committee in the manner hereinafter provided. [The Selection Committee shall meet as often as necessary.]

4(a) The Selection Committee for the appointment of a teacher of the University (other than the Director of an Institute and the Principal of a constituent college), shall consist of –

i. The Vice-Chancellor who shall be the Chairman thereof,

ii. The Head of the Department concerned:
Provided that the Head of Department shall not sit in the Selection Committee, when he is himself a candidate for appointment or when the post concerned is of a higher rank than his substantive post and in that event his office shall be filled by the Professor in the Department and if there is no Professor by the Dean of the Faculty:
[Provided further that where the Chancellor is satisfied that in the special circumstances of the case, a Selection Committee cannot be constituted in accordance with the preceding proviso, he may direct the constitution of the Selection Committee in such manner as he thinks fit.]

iii. In the case of a Professor or Reader, three experts, and in any other case, two experts be nominated by the Chancellor;

iv. In the case of appointment of teachers in a department of a constituent medical college upgraded under any scheme sanctioned by the Central Government, one nominee each of the Central Government and the State Government;

v. In the case of appointment of teachers of an Institute or constituent college, the Director of the Institute or the Principal of the constituent college, as the case may be."

Section 31, thus, provides for the modality to select the teachers. At the relevant time, this modality was not available and thus, the University, which was to become a teaching University, was not equipped with the machinery and the teachers to teach. Since, the

University had to have the teachers within the parameters of Section 2(19) of the U.P. State Universities Act, who are duly selected under Section 31 and since that could not be done, a recourse had to be taken for passing the Removal of Difficulties Order, which recourse was taken vide the powers conferred by sub-section (1) of Section 73 of the U.P. State Universities Act, 1973 as also under sub-section (1) of Section 21(8) of U.P. Universities (Re-enactment and Amendment) Act, 1974. Paragraphs 3 & 4 of the U.P. State Universities Removal of Difficulties (Twelfth) Order, 1976 highlights this position. They are as under:

> "And whereas it is just and expedient that the posts of teachers of the aforesaid colleges should be filled by selection from among teachers of all Government Degree Colleges in the State;
>
> And whereas such teachers would be teachers of the University within the meaning of Section 2(19) of the Uttar Pradesh State Universities Act, 1973 (hereinafter referred to as 'the said Act') and the enforcement of the provisions of Selection 31 of the said Act in relation to such selection is likely to create difficulties."

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 73 of the said Act, and sub-section (1) of Section 28 of the Uttar Pradesh Universities (Re-enactment and Amendment) Act, 1974, and in supersession of the Uttar Pradesh State Universities Removal of Difficulties (Eleventh) Order, 1976, the Governor is pleased to direct that during the period of one year from the commencement of this Order, the provisions of the said Act shall have effect subject to the following adaptations, namely,.....

18. Under the first clause, which was to follow thereafter, tow screening committees were to be formulated; one for the University of Kumaon and the other for the University of Garhwal. Sub-clause (2) provided for the composition of such screening committee. Sub-clause (4) provided that only the teachers of the Government College, serving on the date of commencement of the order, would be eligible

for appointment. Sub-clauses (9) & (10) of these adaptations are extremely important. They are reproduced as under:

> "9. The teachers appointed in accordance with this order shall be deemed to be teachers of the University concerned appointed under Section 31 of the said Act, and they shall be on one year's probation from the date of such appointment.
>
> 10. The seniority *inter se* of teachers so selected for any of the two aforesaid Universities shall be the same as it stood while they remained in Government service before such selection."

19. It was, therefore, obvious that the transition of the teachers of the Government College to the teachers of the University was to be complete subject to their probation. Under clause (9) such teachers, appointed in accordance with the Removal of Difficulties Order, were deemed to be the teachers of the concerned University appointed under Section 31 of the Act, meaning thereby, that the screening committee was to be final authority to select the teachers and such selection was to be deemed as the selection under Section 31 of the Act.

20. We have deliberately quoted Section 31 of the Act above to suggest that originally as per that section the teachers of the University could be selected only on the Selection Committee. By the Removal of Difficulties Order, the modality under Section 31 of the Act was given a go by and that task of selecting the University teachers was conferred upon the screening committee. Again, by clause (10) it was provided that the seniority of the *inter se* teachers, so selected for any of the two aforesaid Universities, was to be the same as it stood while such teachers remained in the Government Service. On this backdrop of the proceedings, we, now, proceed to decide the first two questions together as they are apposite to each other.

**Questions No. 1& 2:**

21. It is an undisputed fact and though the petitioner had given a complete go by in her initial writ petition to the facts regarding the screening committee, it has become apparent, now, that for being selected to the University, both the petitioner and the respondent No. 4 appeared before the screening committee. It has also come in the affidavit of the University that in that screening, the petitioner was rejected while the respondent No. 4 was selected and thus, the respondent No. 4 became a University teacher prior to the petitioner and this selection was deemed to be a selection under Section 31 of the Act and he was deeming to be a University teacher right from the day he was appointed and he accepted the offer of appointment, which was in the year 1977. These facts remained uncontested.

22. The petitioner tried to get out of this apparently difficult position by suggesting distantly that she was selected by the screening committee of Garhwal University, but that plea would have to be ignored in the absence of any particulars regarding the date etc. of such selection and more particularly, because we are not concerned with the seniority in Garhwal University, but the seniority in the Kumaon University, where presently, both the petitioner and the respondent No. 4 are serving. That plea, therefore, does not impress us at all and that does not confer any benefit on the petitioner because even if it is accepted that she was selected by the screening committee of Garhwal University, she has not chosen to accept that offer and has, instead, chosen to remain in Kumaon University. There is not even a whisper of challenge to the verdict of the screening committee for the Kumaon University favourable ot the respondent No. 4, who was selected and though, the petitioner has avoided to state, the fact remains that she was rejected in comparison to the respondent No. 4 by the screening committee for Kumaon University. Thus, the respondent No. 4 had stolen a march over the petitioner way back in 1977 and he was the first to join the Kumaon University as compared to the petitioner.

23. On this factual and legal anvil, when we consider the clauses (9) and (10) of the Removal of Difficulties Order, it is obvious that the respondent No. 4 would steal a march because of the deeming provisions contained in clause (9). Again, when the question of seniority, *inter se*, of the teachers selected by the screening committee, is to be considered, the erstwhile seniority position of such teachers was to remain. It is quite another thing that the petitioner was not selected at all and therefore, it would be incorrect on her part to insist that she is senior to the respondent No. 4. As a matter of fact, even if she was selected by the screening committee, she would still be junior because of the operation of clause (10) and as the University had already pointed out in its counter affidavit, which was not disputed, the respondent No. 4 was above her in the matter of their regularization in the Government service.

24. The question still remains as to what should be the basic dated for reckoning the seniority. It is apparent from the language of clauses (9) and (10) of the Removal of Difficulties Order that after the selection, such teachers are deemed to be the teachers selected and appointed under Section 31 of the U.P. State Universities Act. If the deeming clause, thus, confers the status of a University teacher on the person like the respondent No. 4, who was selected by the screening committee, the further aspects regarding the date of resignation etc. would be pushed to the background and they would be merely deemed to be the ministerial acts. It is apparent that in order to take the advantage of the pension scheme and the other benefits arising out of the Government service, the respondent No. 4 continued to be on deputation. It is obvious from the letter of the Joint Secretary dated 20.09.1977 that the teachers in the constituent colleges, who were Government servants, were after the said colleges were made over to the University, to be treated on the foreign service of the University and those who were not selected by the screening committee or those who did not opt for the University service, the efforts should be made for their absorption in the other Government colleges. In this letter,

the Joint Secretary asked the Director, Higher Education, Uttar Pradesh to proceed further in the lights of his instructions under this letter. This suggests that those teachers, who were selected by the screening committee and who had chosen to join the University by accepting the appointments, were to go finally in the University service. By another letter dated 16.02.1979, the Deputy Secretary, Uttar Pradesh, referring to the Government Order dated 20.09.1977 has clarified that those teachers, who were selected by the screening committees, would be treated to be on the foreign service of the University and they would be paid the same salaries, which they were getting in the Government service. However, they would not be entitled for any deputation allowance. It is also suggested in this communication that such Government teachers, who were selected by the screening committee, would be treated to be on the foreign service from the date they joined the constituent colleges of the University till their final absorption. Paragraph 6 of this communication suggests that such teachers would stop paying the contribution to the Provident Fund and their Provident Fund amount, so far collected, would be made over to the University.

25. Thus, it is obvious that the person like the respondent No. 4, who was selected, was on a point of no return and had, for all the practical purposes, joined the University way back on 15.08.1977. It is to be seen in these letters that the terms and the conditions of deputation as well as the final absorption were not decided by the Government and the Government had reserved, to itself, a right to decide the same. It is liable to be noted, at this time, admittedly the petitioner was not even in the University service because she was selected by the regular process under Section 31 of the U.P. State Universities Act only in the year 1979. It seems that the respondent No. 4, thereafter, resigned w.e.f. 30.12.1983 and his resignation was accepted on 30.12.1986 and the permission was also granted by the Director, Higher Education for absorption of the deponent in the

University w.e.f. 31.12.1983 in pursuance of the Notification dated 16.02.1979, to which, we have already referred earlier.

26. So far everything was fine, however, in the year 1985, the Government came up with a scheme for granting personal promotion to the teachers, who had served as the lecturers for the continuous period of 5 years in the University. Now, because of the respondent No. 4 resignation having been accepted with effect only from 31.12.1983 in the year 1985, he could not have had the service of the University of 5 years though, if fact, he was actually serving in the University right from his selection by the screening committee w.e.f. 16.08.1977. It seems that in order to remove this difficulty in case of respondent No. 4 and some other teachers, the Notification was brought on 7.09.1987. By this Notification, it was provided that the teachers in the Government colleges, who were selected by the U.P. Public Service Commission and who were confirmed in their colleges and who were subsequently selected by the screening committee, would be absorbed in the University between their date of initial appointment to the University and 16.02.1980 in case such teachers choose to exercise an option in favour of the University and such date would be taken as the dated of absorption. In para 3 of the said Notification, it was clarified that this Notification was also applicable to those teachers, who had earlier exercised their option in view of the Notification dated 16.02.1979. It is obvious from this Notification also that after the selection of the teachers by the screening committee, such teachers were always treated to be the part and parcel of the University and that their resignations from the Government service was only treated as a matter of formality and this was, indeed, a correct way of looking at it because these teachers had already snapped their umbilical cord with the Government service by opting in favour of University service in pursuance of the Notification dated 16.02.1979. It is obvious that in pursuance of this Notification dated 7.09.1987, 22 teachers including the respondent No. 4 and the petitioner, herself, had taken the benefit and exercised their option by

changing the date of absorption. In this, the petitioner changed her absorption date to 16.02.1980. Consequently, the University also forwarded to the Government, the new date of absorption of all these teachers vide its letter dated 11.12.1987. The Executive Council had also, by its Resolution dated 22.01.1988, accepted the new dates of absorption.

27. All this will certainly go to suggest that the Government, which had reserved to itself the right to decide the terms of absorption, had leaned in favour of these teachers, who were selected by the screening committee to give them the advantage of personal promotion scheme as also the other beneficial schemes, which we have referred to earlier, which was to be available only on account of 5 years of seniority. The aspect of the personal promotion and the other benefits has to be considered apart from and separately from the question of seniority and the date, from which, it would be reckoned. There was nothing wrong in the Government to decide to grant the seniority from a particular date and more particularly, from the date when they actually joined the University. In fact, the principle of seniority, being based on the date from the continuous officiation, has already been accepted by the Apex Court in a number of decisions. In this case, the factum of the subsequent resignations by these teachers was merely ministerial and it did not change their status even for a day. In short, after being selected, they continued to be in the University service. When we see these Notifications in the light of the clauses of Removal of Difficulties Order, it becomes clear that the seniority of the teachers would have to be reckoned on the basis of their first entry into the University from the Government service even by way of a foreign service. The service of these teachers in the University was treated to be a foreign service or on the deputation only because the Government, till then had not decided upon the conditions, on which, the transition of these teachers was to take place, which is very clear from the various paras in the Notification dated 16.02.1979 and the other Notifications. It is, therefore, obvious that the first two

questions will have to be decided holding that the date of seniority would have to be reckoned from the date when these teachers were selected by the screening committee and for the first time, joined the University as the University teachers contemplated under Section 31 of the U.P. Universities Act. On that basis, it will have to be held that the exercise by the University to pass the impugned Resolution dated 21.01.1988 and its subsequent approval by the Government is absolutely correct in law and cannot be termed as an injustice against the petitioner.

28. Some argument was raised by Mr. Manoj Tiwari, learned counsel for the petitioner that in the said Resolution being approved by the Government, there was a complete impropriety as the Government would have no control over the University. We refuse to go into that question for the simple reason that this question is not apposite to the controversy involved in the writ petition. We are concerned with the sole question as to whether the seniority should be reckoned from the first date of joining of the University or it should be reckoned from the date, when the resignations were given by these teachers from their Government service. We are of the clear view that the University has not committed any wrong in passing the impugned Resolution. We will also not go into the question of the propriety of the University to send its Executive Council Resolution for the approval of the Government because, in our opinion, that is also not the controversy involved once the basic principles for reckoning of the seniority are decided. In our opinion, the deeming clause would divest the teachers of their character as the Government servants and they would be deemed to be the University lecturers as if selected under Section 31 of the U.P. State Universities Act.

29. Mr. L.P. Naithani, learned Senior Counsel pressed into service a decision by the Supreme Court reported in 2003 (11) SCC 632 in the case of Ali M.K. & others Vs State of Kerala & others, wherein the Supreme Court has considered the effects of the deeming clauses and

more particularly, the observations made by the Supreme Court in paragraph 13 thereof after referring to various English, American and Indian decisions. In our opinion, it is not necessary to quote the decision excepting the following paragraph from an English case St. Aubyn (L.M.) Vs. Attorney General; 1951(2) All England Report 473:

> "The word 'deemed' is used in a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

The other apposite paragraph is from Levy, Re, ex p Walton; 1881(17) Ch D 746, which is as under:

> "When a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain fro what purposes and between what persons that statutory fiction is to be resorted to. After ascertaining the purpose full effect must be given to the statutory fiction and it should be carried to its logical conclusion and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate."

30. In short, the deeming fiction would have to be given a full effect. In the present circumstances, if that full effect is to be given, then, it will have to be held that the teachers, who were selected by the screening committee, became the University teachers from the day, they had joined the University. The language of Section 9 in Hindi as well as in English is very clear and we will have to give full thrust to that language of the deeming clause, which suggest in unequivocal terms that a teacher selected by the screening committee would be considered to be a University teacher duly selected under Section 31 of the U.P. State Universities Act. That, in our opinion, would clinch the issue in favour of respondent No. 4 and against the petitioner because if a person is considered to be a University employee, there

will be no point in, then, relying upon the subsequent events and tendering the resignations from this date or that date and that would be merely an empty formality, particularly, in case of the teachers, who have cut their ropes and burnt their boats while entering the University service.

31. A reference was made by Mr. Manoj Tiwari to para 18.05 of the First Statute of the University dealing with the seniority of the teachers. The learned counsel relies on clause (c), which lays down that the teachers holding substantive posts in any University to a post of corresponding rank or grade in the University shall be entitled to the entire period of service added to his length of service. Clause (d) was also referred, which suggests that in case of services rendered in any affiliated or associated College, one half of the period of substantive services rendered by such teachers, shall be added to his length of service. In fact, all these references are unnecessary, particularly, in view of the Removal of Difficulties Order. These Statutes would always be subject to the Removal of Difficulties Order.

32. Mr. Manoj Tiwari, learned counsel also relied on a reported decision in A.K. Bhatnagar's case reported in 1991(1) SCC 544. We have gone through the decision and in our opinion, it does not apply to the facts of the present case at all. It only provides that the seniority is always governed by the Rules made for the purpose of the computation of seniority. We do not find anything to support the petitioner in this decision. The second decision relied upon by the learned counsel is Udai Pratap Singh Vs State of Bihar reported in 1994 Suppl. 3 SCC 451 to suggest that an Executive order, by operating retrospectively, cannot destroy the rights, which have crystallised. We have already pointed out that there was no right crystallised in the petitioner at all and even if, for certain period, she was shown to be senior, that was obviously incorrect. The other decision in the case of State Mysore Vs H. Pappna Gowda & another

reported in 1970(3) SCC 545 is also not apposite to the controversy involved. A reference is also made to a decision in the case of S.K. Saha Vs Prem Prakash Aggarwal reported in 1994(1) SCC 431 and a paragraph quoted therein from the earlier decision of State of Mysore Vs Pappna Gowda. This is not a case, where the State Government has, in any manner, either cancelled the posts or declared that these teachers would not be in the Government service. What has been done, has been done through the modality of the Removal of Difficulties Order. That apart, in this case, the Government servants have actually given the options and the question is only as to what date should be given to him for the absorption in the University. The other decision is reported in 1973(3) SCC 765. The idea in relying upon this decision is to attack the Removal of Difficulties Order, itself, which was not the tenor of the petition at all, therefore, the reliance on that decision is unnecessary. The other two decisions, namely, Sultan Sadique Vs Sanjay Raj Subba reported in 2004(2) SCC 377 and Dinesh Chandra Sanfama Vs State of Assam reported in 1977(4) SCC 441 are not relevant to the controversy involved in this writ petition at all. In these two decisions, there was no availability of a clause like clause (9) of the Removal of Difficulties Order. Lastly, a decision in the case of State of Maharashtra Vs Laljit Rajshi Shah reported in 2000(2) SCC 699 is relied upon to suggest that the Court has to ascertain as to for what purpose the fiction is created and after ascertaining this, the Court is to assume all those facts, consequences of which, are incidental or inevitable corollaries to giving effect to the fiction, but in so construing the fiction, it is not to be extended beyond the purpose, for which, it is created or beyond the language of section by which it is created. There can be no doubt on this principle as laid down, but such is really not the case and we have already explained that the Removal of Difficulties Order was only for the difficulty faced by the University because of the provisions under Section 31(4)(a) of the U.P. State Universities Act. We have already dwelt upon that issue in the earlier part of the judgment.

33. A faint effort was also made by referring to the earlier judgment of the Allahabad High Court. Relying upon that judgment, it was tried to be stated that in that judgment, the Allahabad High Court had refused to give the benefit of seniority. If the Government has chosen to lean in favour of the petitioners and thereby, according benefits, the judgment, at least at this stage, would loose all its implications. It was decided on the basis of the facts, which were then available and the judgment pertained, more or less, to the teachers like the respondent No. 4 or the petitioners in writ petition No. 511 of 2003 (S/B) being entitled to the promotions. The question as to what should be the reckoning date for seniority, did not directly fell for consideration in that judgment. This is apart from the fact that the University also changed its stand and in our opinion, rightly.

34. After considering all the pros and cons, we answer the first two questions against the petitioner and in favour of respondent No. 4. We have, in the earlier part of the judgment, discussed and held that the University and the Government were justified in allowing the teachers to resign retrospectively. We, accordingly, answer the third question also.

35. In short, in our considered opinion, the writ petition No. 241 of 2002 (S/B) has no substance and it is liable to be dismissed and is accordingly, dismissed. Writ petition No. 511 of 2003 (S/B) is disposed of in view of our observations made and the controversy involved in that writ petition regarding the seniority shall be governed by this judgment. Since the petitioners in that writ petition No. 511 of 2003 (S/B) are already conferred the seniority, it would be unnecessary for us to pass any orders in respect of that writ petition.

36. It is, now, submitted that the seniority list published by the University can still be challenged under the provisions of Section 68 before the Chancellor. If any teacher is aggrieved, the said teacher is at liberty to do so.

37. With these observations, the writ petitions are disposed of. No order as to costs.

**(Irshad Hussain, J.)** **(V.S. Sirpurkar, C.J.)**

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